No. 73-934

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MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

SERVICE TECHNOLOGY CORPORATION, A SUBSIDIARY OF LTV AEROSPACE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b) is reported at 480 F. 2d 923. The Board's decisions and orders (Pet. App. 1c-13c, 1d-38d) are reported at 196 NLRB No. 160 and 199 NLRB No. 102.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2b-3b) was entered on July 30, 1973, and a petition for rehearing was denied on November 5, 1973 (Pet. App.

1a). The petition for a writ of certiorari was filed on December 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that Barbara Salvato was not a confidential employee and that she was discharged because of her protected activity on behalf of the union.

2. Whether the Board properly declined to permit relitigation in the unfair labor practice proceeding of issues determined in the earlier representation proceeding.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 3-4. Also relevant is Section 3(b), which provides in pertinent part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any

interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. * * *

STATEMENT

1. Under contract with the National Aviation and Space Agency ("NASA"), petitioner Company provides visitor services, public information services and exhibit displays at the Manned Spacecraft Center in Houston, Texas (Pet. App. 5d). In January 1971, Mrs. Barbara Salvato, an exhibit scheduler, and Richard Hancock, an escort, met with officials of District No. 37, International Association of Machinists (the Union) at Mrs. Salvato's home to discuss organizing the Company's clerical and escort employees (Pet. App. 20d; A. 114-115).[1] Mrs. Salvato signed an authorization card and took additional cards. She later obtained signatures on them during the lunch periods in the cafeteria (Pet. App. 20d; A. 115-116). On February 19, the Union filed a petition with the Board seeking to represent the escort and clerical employees (Pet. App. 6d). The hearing on the Union's petition was held on March 26, and, by that time, Project Manager Lockridge had learned of Mrs. Salvato's activity on behalf of the Union (Pet. App. 6d, 20d; A. 135).

At the hearing, the Company stated that, as a re-

[1] "A." refers to the appendix to the briefs in the court below.

sult of the staffing specifications on NASA's most recent request for bids, the Company had eliminated the position of secretary to Project Manager Lockridge as of April 1, and that thereafter the exhibit scheduler would spend half her time as Lockridge's secretary and the remainder as exhibit scheduler (Pet. App. 6d, n. 3; A. 145-146). On April 1, the position of secretary to the project manager was abolished, and Patricia Hopkins, who had been Lockridge's secretary for over a year, was transferred to duty as an escort (Pet. App. 8d; A. 113, 147). During the first three weeks of April, however, she spent "a substantial portion of her time" assisting Lockridge (Pet. App. 12d; A. 114, 131-132, 158).

During this three-week period in April, Mrs. Salvato, in addition to her work as exhibit scheduler,[2] spent about 5 percent of her time doing typing for Lockridge (Pet. App. 15d; A. 112). This typing included Lockridge's notes of the negotiations with the Union on March 31, April 2, and April 13, concerning a contract for the exhibit employees;[3] a memorandum to Lockridge from Exhibits Supervisor Kennedy listing the projects which would be affected by a strike of the exhibit employees; and a list of the escort and clerical employees eligible to vote in the election[4] (Pet.

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[2] Exhibit schedulers maintain files, carry on correspondence, and generally handle the clerical functions in connection with exhibits (Pet. App. 7d-8d).

[3] In 1968, the Union had successfully organized the employees who fabricate and erect exhibits (Pet. App. 6d).

[4] On April 13, the Regional Director had ordered that an election be held on the Union's petition (Pet. App. 6d).

App. 13d-14d; A. 112, 179-188). She had no responsibility for Lockridge's files as she was unfamiliar with them (Pet. App. 12d; A. 159).

On April 19, Salvato encountered a fellow employee, Mrs. LeBecca Kite, in the ladies' room (Pet. App. 22d-23d; A. 117, 137). After an exchange of "trivialities," a discussion of the upcoming Union election occurred during which Salvato told Kite that, if she could not vote for the Union, she should not vote (Pet. App. 22d-23d; A. 137-138). Kite later related the incident to Lockridge (Pet. App. 24d; A. 138-140, 162).

The following day, Lockridge summoned Mrs. Salvato to his office, where she met Lockridge, Exhibits Supervisor Kennedy, and Chief of Industrial Relations Mitchell (Pet. App. 25d; A. 118, 150-151). Lockridge placed Salvato on a three-day suspension without pay "for carrying on illegal Union activity on Company premises and Company time" (Pet. App. 25d; A. 161). The following Monday, April 26, she was discharged because she had allegedly "threatened" Mrs. Kite (Pet. App. 26d-27d; A. 120).

At the election, held on May 13, 8 votes were cast for the Union, 6 votes were cast against it, and 4 ballots were challenged, including that of Salvato who was challenged on the ground that she was a confidential employee (Pet. App. 3d). Since the challenges were sufficient to affect the results of the election, the Regional Director ordered that a hearing be held on the issues raised thereby. Meanwhile, a complaint issued on the Union's charge that Salvato had been unlawfully discharged. The two proceedings were consolidated for hearing before a Trial Examiner (Pet. App. 1d-2d).

2. The Trial Examiner found that Salvato was not a confidential employee. He explained that (Pet. App. 16d, citations omitted):

> There are two elements that must be considered in determining whether particular employees should be excluded from a unit as "confidential": first, the executives to whom the employees are attached must be "persons who formulate, determine, and effectuate management policies in the field of labor relations" and second, the employees must "assist and act in a confidential capacity to [those] officials." * * *

The Examiner expressed "doubt" whether Lockridge effectuated labor policy, since he had very limited duties concerning labor relations and primary responsibility therefor rested with the Company's director of labor relations (Pet. App. 17d, n. 12). He found that, in any event, "the small amount of typing performed by Mrs. Salvato for Lockridge, her lack of access to any of his files, the physical separation of her working area from his office, and her complete lack of other contact with matters relating to labor relations, lead to the conclusion that she cannot properly be designated as a person acting in a 'confidential' capacity to Lockridge" (Pet. App. 17d-18d).[5]

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[5] The Examiner noted that "the company's arrangement for providing Lockridge with secretarial services, as projected in the representation hearing, was not brought into existence: Lockridge's secretary was not transferred to the position of exhibits scheduler and Mrs. Salvato, who was the exhibits scheduler both before and after April 1, neither devoted half her time to acting as Lockridge's secretary nor did she 'have access to all personnel files'" (Pet. App. 17d).

The Examiner further rejected the Company's contention that it lawfully "discharged [Salvato] for a breach of Company rules in threatening Mrs. LeBecca Kite" (Pet. App. 27d). The Examiner stated (Pet. App. 28d):

> Insofar as the company's justification for the discharge is based upon union activity "on company time," it cannot be sustained, any more than a rule prohibiting such activity in those terms could justify discipline or discharge. [Citing *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793.]
>
> Consideration of the language used, according to Mrs. Kite's testimony, in the conversation between her and Mrs. Salvato leads to the conclusion that nothing in it can reasonably be construed as a threat. There is nothing inherently coercive about urging abstention from voting and there is no claim that the words meant anything more than that. [Footnote omitted.]

He concluded (Pet. App. 29d):

> The various reasons assigned by the company for discharging Mrs. Salvato were * * * pretexts to mask its real reasons for her discharge and that the real reasons were retaliation for her organizational activities and the desire to rid itself of a union adherent. * * *

The Board sustained the Examiner's findings that Salvato was not a confidential employee, and that her discharge violated Section 8(a)(3) and (1) of the Act.

It ordered the Company to reinstate Salvato, and it directed the Regional Director to count her ballot and those of 2 others found to be valid (Pet. App. 31d-34d, 37d-38d). The revised tally of ballots showed that the Union won the election 9 to 8, and it was certified by the Regional Director (Pet. App. 4c).

3. The Company refused the Union's request to bargain, and, in the subsequent unfair labor practice proceeding, the Board, finding that all issues raised by the Company had been litigated in the prior representation proceeding, granted the General Counsel's motion for summary judgment (Pet. App. 4c-5c). The Board thus concluded that the Company violated Section 8(a)(5) and (1) of the Act in refusing to bargain with the Union, and it issued a bargaining order (Pet. App. 6c-7c, 10c). The court of appeals summarily enforced the Board's order (Pet. App. 1b).

ARGUMENT

1. Petitioner contends that the certification of the Union was invalid because Salvato was a confidential employee and thus not entitled to vote in the election, which the Union won by one vote (Pet. 9-11). The Board, however, found that Salvato was not a confidential employee. Accordingly, the Company's contention merely raises the evidentiary issue whether substantial evidence supports the Board's finding that Salvato was not a confidential employee, which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. In any event, the Board's finding is amply supported by the record.

The Board excludes from bargaining units of other employees "only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B. F. Goodrich Co.*, 115 NLRB 722, 724. Moreover, the Board excludes only those employees who spend a substantial amount of time in such duties. *Moore-McCormack Lines*, 181 NLRB 510, 512. Here, Salvato's work for Lockridge, whose authority to effectuate labor policy was questionable, involved only 5 percent of her total work time. She had no access to the Company's personnel or grievance files, and she worked in an area physically separated from Lockridge.[6] In these circumstances, the Board was warranted in finding that Salvato was not a confidential employee.

2. Similarly, petitioner's contention that Salvato was discharged because she threatened Kite (Pet. 11-16) raises only an evidentiary question. The Trial Examiner rejected Project Manager Lockridge's testimony that Salvato had threatened Kite. He pointed out that Kite had testified that she was not "scared," but rather "angry" (Pet. App. 24d-25d). The Examiner concluded that: "Lockridge's use of the word 'threatened' and the phrase 'possibly she had been threatened physically' * * * represent[ed] his own

[6] As the Examiner pointed out: "The amount of typing [Salvato] performed for him could just as easily have been assigned by Lockridge to any employee on the project with minimal typing capacity—or spread out among several—and, unless consideration is given to the quantity of the services performed, each employee so involved would be thereby excluded from the unit.* * *" (Pet. App. 18d).

contribution to the exchange between the two employees * * * as an effort on his part to exacerbate the tone of the incident to justify his charge of misconduct by Mrs. Salvato" (Pet. App. 25d). The Examiner was thus justified in finding that "nothing in [Salvato's remarks] can reasonably be construed as a threat" (Pet. App. 28d).[7]

3. Finally, petitioner contends (Pet. 16-18) that it was entitled to relitigate in the unfair labor practice proceeding the issue whether Salvato was a confidential employee. It has long been settled, however, that, absent a showing of newly discovered or previously unavailable evidence, matters which were or could have been considered in the representation case may not be relitigated in a subsequent, related unfair labor practice case. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 162. Accord: *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137. Here, petitioner received an evidentiary hearing on its objections in the underlying representation proceeding, and it advanced no new or previously unavailable evidence to support its repetition of those objections in the unfair labor practice proceeding.[8]

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[7] Since the Board's finding that Salvato was not a confidential employee is amply supported by the record (*supra*, pp. 6, 9), there is no occasion to reach the Board's alternative conclusion that, even if Salvato were a confidential employee, she would be protected by the Act against a discriminatory discharge (Pet. App. 29d-30d). See *Wheeling Electric Co.*, 182 NLRB 218, enforcement denied, 444 F. 2d 783 (C.A. 4).

[8] The cases relied on by the petitioner (Pet. 16-17) involve the denial of a hearing in the *representation* proceeding even though substantial and material factual issues were presented. *Pepsi-Cola*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Buffalo Bottling Co. v. ***National Labor Relations Board***, 409 F. 2d 676 (C.A. 2), Pet. 17, which held that the Board must review the decision of the regional director in a representation proceeding, was implicitly modified by this Court's decision in ***Magnesium Casting, supra***, upholding the Board's authority to delegate the deciding of representation issues to regional directors.

☆ U.S. Government Printing Office: 1974—531-475/160